(16,804.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 591.

FLINT, EDDY & COMPANY, APPELLANT,

vs.

GEORGE CHRISTALL AND JAMES GREIG, AS TRUSTEES.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.

	Original.	Print.
Certificate of United States circuit court of appeals	1	1
Statement of facts	1	1
Question of law	2	1
Libel	3	2
Answer	6	3
Opinion, Brown, J	10	6
Clerk's certificate	20	12

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MARCH 17, 1898.

1 United States Circuit Court of Appeals, Second Circuit.

GEORGE CHRISTAL and Another, Libellants and Appellees,
against
FLINT, EDDY & COMPANY, Respondent and Appellant.

A decree in favor of the libellants for $636.70, for general average contribution, interest, and costs having been made by the district court of the United States for the southern district of New York, and an appeal having been taken therefrom to this court, and the cause having come on for hearing, a question of law arose concerning which this court desires instructions of the Supreme Court of the United States for its decision. The facts out of which the question arose are as follows:

Statement of Facts.

On November 9th, 1895, the British steamship *Irrawaddy*, upon a voyage from Trinidad to New York, with cargo, stranded on the coast of New Jersey through the negligent navigation of her master. Up to the time of stranding she was properly manned, equipped, and supplied and was seaworthy.

The vessel was relieved from the strand November 20th as the result of sacrifices by jettison of a portion of her cargo and of sacrifices and losses voluntarily made or incurred by the ship-owners through the master and of the services of salvors.

The *Irrawaddy* then completed her voyage and made delivery of the remainder of her cargo to the consignees in New York on
2 their executing an average bond for the payment of losses and expenses which should appear to be due from them, provided they were stated and apportioned by the adjusters "in accordance with established usuages and laws in similar cases."

An adjustment was afterwards made in New York, which allowed in the general average account the compensation of the salvors, the sacrifices of cargo, and the losses and sacrifices of the ship-owner.

The respondent thereupon paid $4,483.64, which was their full assessment, except the sum of $508.29 charged against them in respect of sacrifices of the ship-owner, which they refused to pay.

The district court made a decree in favor of the libellants; from which decree the respondent duly appealed to this court.

Upon these facts the court desires instruction upon the following question of law, namely:

If a vessel, seaworthy at the beginning of the voyage, is afterwards stranded by the negligence of her master, has the ship-owner, who has exercised due diligence to make his vessel in all respects seaworthy, properly manned, equipped, and supplied, under the provisions of section 3 of the act of February 13th, 1893, a right to general average contribution for sacrifices made and suffered by him subsequent to the stranding, in successful efforts to save vessel, freight, and cargo?

Let a copy of the opinion and the pleadings in the district court be appended to this certificate.

WM. J. WALLACE.
E. HENRY LACOMBE.

3 To the Honorable Addison Brown, judge of the district court of the United States for the southern district of New York:

The libel of George Christall and James Greig, as trustees, against the company incorporated under the name of Flint, Eddy & Co., in a cause of action for contribution in general average, respectfully shows, upon libellants' information and belief:

First. Libellant Christall now resides at Glasgow, Scotland, formerly having been a resident of New Jersey, and said James Greig resides at Upper Montclair, New Jersey, and they exhibit this their libel as trustees under a certain general average bond as hereinafter stated. The respondent is, and was at all the times hereinafter mentioned, a corporation organized under the laws of the State of Maine, but has an office and place of business in the city of New York, within this district.

Second. The steamship *Irrawaddy*, on November 1st, 1895, departed from port of Spain, Trinidad, bound for New York via Grenada, and was engaged in transporting merchandise and property to the port of New York.

Third. The owner of the *Irrawaddy* had exercised due diligence to make said vessel in all respects seaworthy and properly manned, equipped and supplied, and at all times before the casualty of November 9, 1895, said vessel was seaworthy; and was always properly manned, equipped and supplied.

Fourth. On November 9, 1895, by an error of navigation in dense fog the *Irrawaddy* went aground and remained fast on the coast of New Jersey near Asbury Park.

Efforts were made to float the vessel by working the engines full speed astern, by which large quantities of sand got into the machinery causing damage. Further sacrifices on the part of

4 the vessel were made, including the opening of sluices, cutting holes through bulkheads, and flooding the engine-room, as well as the jettison of cargo.

During much of the time that the vessel was aground heavy storms prevailed, causing the vessel to pound and threaten to become a total loss, which rendered the above sacrifices necessary for the preservation of all interests. Finally on November 20th, the vessel was floated by the Merritt Wrecking Organization, by whom she was brought to New York.

Fifth. Among the merchandise transported by the *Irrawaddy* and partly delivered were 8 boxes of feathers, 1,262 hides, 10 bales and one box of rubber, and three bales of balsam, which were consigned to and the property of the respondent.

Sixth. Thereafter and on November 23d, 1895, the respondent, by its treasurer, duly executed and delivered to the libellants, as trustees for all concerned, the usual general average bond, whereby the respondent covenanted and agreed that all losses and expenses

which should be made to appear to be due from respondent in respect to said merchandise should be paid by the respondent, provided that such losses and expenses should be stated and apportioned by Johnson & Higgins, average adjusters, in accordance with the established usages and laws in similar cases.

Seventh. A general average adjustment was made up by said adjusters in accordance with such usages and laws, whereby it appeared that the contributory value of the respondent's said merchandise was $13,649, and the amount due therefrom for general average was $5,254.63, against which was a credit for proceeds of unidentified hides of $262.70, leaving a balance due and payable under said average bond of $4,991.93, which adjustment was duly made up and stated on the fifteenth day of May, 1896.

Eighth. By reason of the circumstances of the stranding,
5 the respondent denies any liability for the vessel's losses and sacrifices, and instead of paying the full amount due under said adjustment, has only paid $4,483.64, leaving due a balance of $508.29, which represents the respondent's share of the losses and sacrifices made in the efforts to float the vessel and cargo and allowed to the ship-owner, in said adjustment.

Ninth. The libellants, as trustees for the owner of the *Irrawaddy*, have demanded from the respondent payment of said sum of $508.29, but that no part thereof has been paid.

Tenth. All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this honorable court.

Wherefore, libellants pray that process issue *in personam* against the respondent, and it be cited to appear and answer all and singular the foregoing, and that the libellants be decreed payment of said sum, with interest and costs, and that libellants have such other and further relief as may be just.

(S'g'd) JAMES GREIG.

Sworn to before me, by said James Greig, for himself and for his colibellant, this 3rd day of March, 1897.

ERNEST W. CONGDON,
[SEAL.] *Notary Public, Kings Co.*

Certificate filed in N. Y. county.

COWEN, WING, PUTNAM & BURLINGHAM,
Proctors for the Libellants.

(Endorsed:) Libel. Filed March 3, 1897.

6 To the Honorable Addison Brown, district judge of the United States for the southern district of New York:

Flint, Eddy & Co., proceeded against in this court on the libel of George Christall and James Greig, as trustees, answer said libel as follows:

First. The respondents admit the allegations in the first article of the said libel contained.

Second. The respondents, upon information and belief, admit the allegations in the second article of the said libel contained.

Third. The respondents have no knowledge or information respecting the matters alleged in the third article of the said libel, but do not dispute the same.

Fourth. The respondents, upon information and belief, deny the allegations in the fourth article of the said libel contained, and aver that the circumstances were as follows:

On November 9th, 1895, by the fault and negligence of the servants of the ship-owners in charge of the navigation of the *Irrawaddy*, the steamer went aground and remained fast on the coast of New Jersey, near Asbury Park. Efforts were made to float the vessel by reversing the engines, and thereby sand got in the machinery, causing damage. The vessel pounded and strained heavily on the strand and thereby a large quantity of water found its way into the after hold and the sluices were opened to let such water into the engine-room.

The Merritt Wrecking Organization, as salvors, had come to the relief of the vessel and had placed the pumps in the engine-room for the purpose of freeing the vessel of water.

Later the sluices in the after bulkhead became choked, and thereupon holes were cut in the bulkhead to allow the water to pass to the pumps in the engine-room.

F-nally on November 20th the vessel was floated by the salvors, by whom she was brought to New York.

7 During the salvage operations and for the purpose of relieving the vessel from the strand, large quantities of cargo were jettisoned and with the freight thereon became lost.

Fifth. The respondents admit the allegations in the fifth and sixth articles of the said libel contained.

Sixth. The respondents admit that an adjustment has been made up by said adjusters, which adjustment bears date the 15th day of May, 1896, whereby it appears that the contributory value of the respondents' said merchandise is $13,649, and the amount due therefrom for general average is $5,254.63, against which is a credit for proceeds of unidentified hides of $262.70, leaving a balance due and payable of $4,991.93. But the respondents deny that such adjustment is a general average adjustment made up in accordance with established usages and laws in similar cases, or that said adjustment is duly made up and stated; but aver that it is incorrectly made up in the respects hereinafter designated.

Seventh. The respondents admit the allegations in the eighth and ninth articles of the said libel contained and admit that the premises are within the admiralty and maritime jurisdiction of the United States and of this court; but they deny that all the premises are true.

Eighth. Further answering the said libel, the respondents aver that the said adjustment is not duly made and stated, and is not in accordance with usages and laws in similar cases in that it admits and allows as expenses to be contributed for by the cargo in general average, the costs and charges of the owners of said vessel in respect

to the damages to the steamer through reversing the engines, as aforesaid, whereby sand got in the machinery, and through opening sluices and boring bulkheads as aforesaid; and further in that it admits and allows as an item to be contributed for in general average in favor of the ship-owners the full amount of freight on jettisoned cargo in the amount of $600.65, whereas such amount
8 of freight would have been earned only upon delivery of such cargo in New York; and in view of the expenses necessary to earn said freight the interest of the owners therein at the time of the jettison of the cargo and the loss of the freight was only $510.

The respondents aver that inasmuch as the stranding of the *Irrawaddy* was due solely to the fault and negligence of the servants of the ship-owners in charge of her navigation, none of the above allowances should have been admitted by the adjusters.

The respondents further aver that the share or portion of such allowances which have been charged in said adjustment against the cargo of the respondents aggregates the full sum of $508.29, which amount they have accordingly refused to pay, although they have paid all other and proper charges of a general average character stated in said adjustment. That of the said sum of $508.29 about $400 is in respect of the damage caused by sand getting into the machinery through the reversing of the engines as aforesaid.

Ninth. The respondents further aver that in the event that they are found liable by this court in respect to any of the said alleged losses and sacrifices of the ship-owners, the amount thereof which has been charged in said adjustment against the respondents' cargo in respect of freight upon jettisoned cargo is excessive in the amount of thirteen $\frac{65}{100}$ dollars by reason of full freight on such cargo being allowed to the ship-owners in lien of net freight only.

Tenth. All and singular the premises are true.

Wherefore the respondents pray a judgment of this court, and that the libel herein be dismissed with costs.

BUTLER, NOTMAN, JOLINE & MYNDERSE,
Proctors for Respondents,
54 *Wall Street, New York City.*

9 CITY AND COUNTY OF NEW YORK, } ss.:
Southern District of New York, }

A. De Buys, being duly sworn, says that he is the 1st vice-president of Flint, Eddy & Co.; that he has read the foregoing answer and knows the contents thereof, and that the same is true to his best information and belief.

A. DE BUYS.

Sworn to before me this 24th day of May, 1897.

FRANKLIN ABRAMS,
[SEAL.] *Notary Public, Kings County.*

Certificate filed in N. Y. Co.

Endorsed: Answer. Filed May 26, 1897.

10 United States District Court, Southern District of New York.

GEORGE CHRYSTAL *et al.*
vs.
FLINT, EDDY & Co.

In admiralty. General average. Negligence. Harter act.

BROWN, *J.:*

In November, 1895, the British steamship *Irrawaddy*, upon a voyage from Trinidad to New York, stranded on the coast of New Jersey, through negligence in navigation. Up to the time of stranding it is admitted that she was properly manned and equipped, and seaworthy. In endeavoring to get her off the beach by working her propeller with reversed engines, her machinery was damaged by sanding and by water from leaks, which was allowed to flow into the engine-room in order that it might be pumped out; and, on the sluices becoming choked, holes were bored in the bulkhead to permit the water to pass to the pumps. With the aid of salvors, the vessel was finally floated on November 20th, after a jettison of a considerable quantity of cargo. She then completed her voyage and made delivery of the rest of the cargo to the consignees in New York, on their executing an average bond for the payment of all losses and expenses which should appear to be due from them, provided they were stated and apportioned by the adjusters "in accordance with the established usages and laws in similar cases."

An adjustment was afterwards made in New York which allowed in the general average account (1) the salvor's compensation, (2) the value of the jettisoned cargo, and (3) to the ship-owner,
11 the gross freight on the cargo jettisoned, and (4) the damages to the ship by sanding and by the flow of water into the engine-room. The respondents thereupon paid $4,483.64, their full assessment, except the sum of $508.29 charged against them for the last two items above named, which they refused to pay, on the ground that as the stranding was caused by negligence in navigation, the ship-owners were debarred from any recovery of general average from the cargo; they also claim that if any freight is recoverable for the goods jettisoned, it is only the *net* freight—*i. e.*, the gross freight less the stevedore's and other charges which would have been incurred by the ship-owners on the actual delivery of the goods had they not been jettisoned. The difference, it is agreed, would in this case be $13.65.

The above libel was filed upon the general average bond, for the recovery of the last two items in the general average adjustment above named, on the ground that as the ship-owners are not responsible to the cargo-owners for the negligent navigation of the ship under the provisions of the Harter act of 1893 (2 Sup. Rev. St., 89), such negligence does not now debar them from general-average claims; and that gross freight is recoverable, because such is the established law and usage of this country and of this port. All the facts are admitted, except as to the custom in regard to charging

gross freight, upon which point witnesses have been examined upon both sides.

The questions presented are important, because they enter largely into every case of a general average adjustment growing out of faults or errors of navigation; and it is essential that the rule which is to be followed in average adjustments in cases falling within the Harter act should be finally determined.

There is no doubt of the ordinary rule, in the absence of statute or contract to modify it, that where the peril has been brought about by the fault of the ship-owner or his servants in the navigation of the ship, the ship-owner cannot recover from the cargo reimbursement by means of a general average for his expenses in rescuing the ship or cargo. The codes of the principal maritime countries
12 so provide in express terms; and our law is the same. Gourlie Gen. Avg., 15; Lowndes on Avg., 4th ed., 34; *The Ontario*, 37 Fed., 222; Ralli *v.* Troop, 37 Fed., 888, 890; Vanden Toorn *v.* Leeming, 70 Fed., 251. This rule is not enforced against the ship-owner alone; it applies equally to the cargo-owner, and to any other claimant of contribution by whose fault the necessity for the sacrifice or expense was caused. Several of the maritime codes expressly so state (Germany S. S., 704; Sweden S. S., 191; Denmark S. S, 192; Spain S. S., 810). Lowndes summarizes the principle and the general rule as follows:

"The broad principle may be laid down that no one can make a claim for general average contribution, if the danger to avert which the sacrifice was made has arisen from the fault of the claimant, or some one for whose acts the claimant has made himself, or is made by law, responsible towards the co-contributors," p. 34.

Considering that the claim to contribution in general average rests only upon equitable principles, it is hardly conceivable that this rule of exclusion could be otherwise. For if one's own fault, or the fault of those for whom one is legally responsible, has made necessary the expenses he incurs to retrieve it, there is no principle of equity that can sustain his claim that other persons, not in privity with him, should help him bear the loss. It is the responsibility for the fault and for the consequent damage that makes the crucial distinction in these cases. All the maritime codes that exclude the ship-owner from reimbursement in general average for the ship's fault make him liable to cargo-owners for the master's bad navigation. This exclusion is based on his liability to the cargo-owner, which logically and necessarily excludes the ship-owner's claim to contribution in two ways: First, because the obligation to indemnify would require the ship-owner at once to restore to the cargo-owner as damages whatever he might collect from him as general average; second, because this same obligation makes the ship-owner's claim to contribution incompatible in its inception with the funda-
13 mental conditions of a general average claim, viz., that there must be (1) a sacrifice, (2) a sacrifice voluntarily incurred, (3) a sacrifice incurred for the common benefit. But when the ship, through the master's fault, is legally responsible for all loss and damage, her expenses in rescuing the cargo from the peril which

that fault has brought about cannot possibly be treated as a sacrifice, since such expenses are nothing more than the performance of a legal obligation; for the same reason they are not *voluntarily* incurred, in the legal sense, since the ship is legally bound to make the rescue and bear all the expense of it, or else pay the increased damages from omitting to do so; and so the expenses of rescuing the cargo are not ultimately for the cargo's *benefit*, but for the pecuniary benefit of the ship, in diminishing as much as possible the cargo damages for which the ship's liability is already fixed by reason of her fault. Thus the ship's liability for all the loss and damage arising from her fault, whenever this liability arises, necessarily excludes any equitable claim by her owner to an average contribution from the cargo, because the legal conditions of such a claim cannot in such a case exist; and because, if allowed, any such contribution must be at once repaid to the cargo-owner as damages.

I have dwelt somewhat fully upon this liability of ship and owner, and its relation to general average claims against the cargo, because there is no doubt, I think, that the liability to indemnify the cargo-owner is the sole ground of the exclusion of the ship-owner's claim to general average compensation for his expenses in rescuing the adventure from a peril caused by bad navigation; and because it, therefore, seems necessarily to follow that in cases where all such liability is abolished by law, as it is under the circumstances of this case by the Harter act, no such exclusion can be justified; and that where no such liability exists on the part of the ship or her owner, his right to a general average contribution from the cargo arises necessarily by the same principles of equitable right that apply in ordinary cases of general average.

14 Where due diligence has been exercised to make the ship seaworthy, and a common danger arises upon the voyage by "fault or error in the navigation or management of the ship," the third section of that act declares that "neither the vessel nor her owner, agent or charterer shall become or be held responsible for damage or loss resulting therefrom." The previous liability of the ship-owner to the cargo-owner for faults of navigation is thus abolished in all cases coming within the act. In such cases faults in the navigation or management of the ship are no longer, by construction of law, faults of the owner, as heretofore; and the ship and her owner are now no more liable to the cargo-owner for his damages therefrom than the latter is liable to the ship-owner for the resulting damages to the ship. Both are alike strangers to the fault, and equally free from all responsibility for it; and hence all expenditures or losses voluntarily incurred for the common rescue are no longer made in the discharge of an individual legal obligation, or in diminution of a fixed liability resting upon one of the parties only, but are truly a sacrifice, voluntarily incurred, and for the common benefit, as much and as truly so when made by the ship-owner as when made by the cargo-owner alone. On principle, therefore, in such cases, the one is as much entitled to a general average contribution for his sacrifices as the other.

In this country and in England it has been held that the mere

fact that the common peril arose by bad navigation, or bad management of the ship, or that a remedy in damages therefor may exist against the ship-owner, does not prevent recovery of general average compensation by a cargo-owner against the ship and against other cargo-owners for his sacrifices made for the common benefit—Pacific Mail S. S. Co. *v.* N. Y. H. & R. Mining Co. (City of Para), 69 Fed., 414; affd., 74 Fed., 564; Strang *v.* Scott, L. R., 14 App. Cas., 601, 609—and several of the maritime codes expressly so declare (German Code S. S., 704; Sweden 1864, act 144, Code 191; Norway
15 S. S., 72; Denmark S. S., 192). In Strang *v.* Scott, *supra*, Lord Watson, in delivering judgment in House of Lords, says: "The owners of goods thrown overboard having been innocent of exposing the *Abington* and her cargo to the sea peril which necessitated jettision, their equitable claim to be indemnified (by a general average contribution) for the loss of their goods is just as strong as if the peril has been wholly due to the action of the winds and waves."

Under this decision, if the ship-owner be "innocent of exposing the ship and cargo to the common peril," as he is under the Harter act, or wherever a valid exemption from liability exists by the bill of lading, the ship-owner's right to an average contribution must be sustained. Accordingly, in the subsequent case of the Carron Park (L. Rep., 15 Prob. Div., 403), Lord Hannen, then president of the probate division, sustained the ship-owner's claim to contribution from the cargo in general average for expenses caused by negligent navigation, where by the terms of the bill of lading the ship-owner was relieved of all responsibility for such negligence; and this upon the simple ground that "the relation of the goods-owner to the ship-owner has been altered by the contract that the ship-owner was not to be responsible for the negligence of his servants." Upon similar clauses in the bills of lading, the same adjudications, and upon the same ground, have been made in the French court of cessation (*L'Amerique*, Dalloz Rep., 1878, 1, 479; *The Alex. Lawrence*, 10 Rev. Int., *du Droit Mar.*, p. 147 (June, 1894); and also in Belgium, *The Alarcity*, 11 do., 123 (1895); though the contrary seems to have been held in Holland. See *The Mary Thomas* (1894), Prob. Div., 104, 108, 113, 116.

It is urged that the Harter act makes no allusion to general average, and was not designed to disturb the law on that subject. This might have been urged more plausibly as the effect and intent of the negligence provisions in bills of lading. Several of
16 the above adjudications as to the effect on general average of such clauses in bills of lading were made long before the passage of the Harter act; and the history of that act shows that it was a part of its general intent to secure to ship-owners under our law, and within the limits prescribed by our act, the benefits enjoyed by ship-owners under such bill-of-lading exemptions by the foreign law. One of the benefits to the ship-owner by the foreign law under such exemptions, as already adjudged when the Harter act was passed, was the right to a general average contribution; and the inference, if any, as to the actual intent of our act would be

that it was designed to embrace that incidental consequence; at least, the contrary cannot be affirmed.

Quite aside, however, from the above adjudications, and from the question of any definite intent by Congress to modify the law of general average, the ordinary rules of construction require that the exemption which the act is evidently designed to afford to the ship-owner from his previous responsibility to the cargo-owner, should be given its full natural scope and effect, without abridgement by any arbitrary or narrow construction that is not warranted by anything apparent in the context, or from the evident object of the statute. "The whole object of the act," says Mr. Justice Brown in *The Delaware* (161 U. S., 459), "is to modify the relation previously existing between the vessel and her cargo," and to fix that relation—that is, a relation of non-responsibility for damages or losses arising out of bad navigation. Such a statutory change in a broad principle of law must carry with it other changes as its necessary accompaniment. In abolishing the previous responsibility of the ship and owner, the intent of the statute must be presumed to be to abolish also whatever is immediately dependent upon that responsibility. In no other way can the statute have its fair and natural effect.

The application of this new relation of non-responsibility under the Harter act to cases of general average does not, in fact, make the least change in the principles of general average contribution.

The rule remains as before, that he by whose fault, actual or
17 constructive, the ship and cargo have been brought into danger cannot recover an average contribution for his expenses in extricating them. And so the counter-rule remains as before, that the interest which, being without fault, makes sacrifices for the common rescue, is entitled to an average contribution from what is thereby saved. Prior to the Harter act, the ship-owner, under our law, was constructively in fault for bad navigation, and hence fell within the former rule. The Harter act, by abolishing his constructive fault and freeing him from all responsibility, withdraws him from the former rule and entitles him to contribution under the latter.

In Ralli *v.* Troop, 37 Fed., 898, it was said that "to deny the owners the benefit of a general average contribution on the ground of negligence would impose on them, in effect, a liability for the fire from which the statute exempts them (Rev. St. *S.* S., 4282);" and so in the present case, to say that the ship-owners shall bear at their own charge all the expenses voluntarily incurred by them in rescuing this ship and cargo from a common peril for which the statute says they shall not be responsible, and to give to the cargo-owner all the benefits resulting to him from these expenses, without charge, by refusing to impose on him the ordinary contribution in general average always hitherto made to one not in fault, is, in effect, to make the ship-owner responsible *pro tanto* for the peril and its consequences, contrary to the very letter and purpose of the statute; since the owner is often practically compelled to make these advances

for the common safety, though not legally responsible for the fate of the cargo.

It is, indeed, the owner's duty to relieve ship and cargo in every peril so far as in his power, but not to do this at his own charge, unless the peril arose through his actual or constructive fault (*The Portsmouth*, 9 Wall., 682, 687). If the law denied contribution to him for sacrifices made for the common good when he was not in fault, the result plainly would often be disastrous to cargo. Maritime policy and necessity not only forbid any such rule, but ages ago they established the opposite rule: that compensation
18 shall be made to those who, not standing in any relation of legal responsibility, make sacrifices for the common safety. The Harter act certainly was not designed to disturb that principle; and it requires that the owners in this case shall receive due contribution from the cargo.

2. Nor do I think, upon the proof, that any error was made in allowing contribution for the gross freight on the cargo jettisoned, without deduction for the slight expense which would have attended actual delivery.

The condition of the average bond upon which the action is brought is, that the losses and expenses shall be apportioned by the average adjusters "in accordance with the established usages and laws in similar cases." The general rule requires the adjustment of average to be made according to the port of destination, or where the voyage is ended, which in this case was New York. The evidence shows clearly that the long established usage here has been to allow the gross freight; and where the bond adopts the local usage, it controls, even if the general law were otherwise (Stewart *v.* West India Pac. Co., L. R., 8 Q. B., 88).

But the general law of this country, and largely elsewhere, except in England, seems to be in accordance with the custom here. Per Story, J., in *The Nathaniel Hooper*, 3 Sumner, 542; Columbia Ins. Co. *v.* Ashby, 13 Peters, 331, 334; *The Ann D. Richardson*, Abb. Adm., 499, 507; Dixon Mar. Ins., 2d ed., 148; Gourlie Gen. Avg., 109, 112; 2 Phil. Ins. S. S., 1301, 1368; 1 Valin, p. 654–'5; Art. 304, Code de Com.; 2 Valroger Com., p. 366; 3 Desjardins Dr. Mar., p. 682; Ulrich Grosse Har., p. 59; Italian Code S. S., 576; Nuova Cod. per Castagnola, p. 435 (1896); 1 Magen's Ins., 289.

The same practice seems to have prevailed for a long period in England, but has been of late modified by the adjusters there. Some efforts have been made by protests, as appears from the evidence, to introduce here the recent English practice, but thus far with so little result as plainly not to amount to any change in the prevail-
19 ing usage. If the amount of expense, though small, which the ship actually saves by not delivering the jettisoned cargo could, as a rule, be accurately ascertained at a comparatively small cost, I see no good reason why the existing custom should not equitably be modified, and the deduction allowed. But under the usage so long and widely prevailing, I do not feel authorized to hold that the adjustment in this case is incorrectly made up. Most of the ship's expenses remain the same, whether a part of the cargo is jetti-

soned or not, such as for wages, provisions, insurance, wear and tear, pilotage, towage, wharfage, etc.; only the mere handling of the cargo seems to remain, and that was done formerly, and is to some extent still done, by the crew, so that the handling of the jettisoned cargo would have caused little, if any, additional expense to the ship. If stevedores are employed to unload the ship, as is now becoming general, the saving of the cost of handling the jettisoned cargo is probably easily ascertainable; and when that becomes the established general method of business, the usage of adjusters in the allowance of freight, it would seem ought to be and probably will be modified accordingly.

Decree for the libellants for the two items claimed, with costs.

Sept. 9, 1897.

20 UNITED STATES OF AMERICA, *Second Circuit*, } *ss*:

I, William Parkin, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing certificate in the case entitled George Christal and another against Flint, Eddy & Company was duly filed and entered of record in my office by order of said court on the 5th day of February, 1898, and, as directed by said court, the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said United States circuit court of appeals for the second circuit, at the city of New York, in the southern district of the State of New York, this 5th day of February, in the year of our Lord one thousand eight hundred and ninety-eight, and of the Independence of the United States the one hundred and twenty-second.

Seal United States Circuit Court of Appeals, Second Circuit.

WM. PARKIN, *Clerk*.

21 [Endorsed:] United States circuit court of appeals, second circuit. George Christal and another, libellants, appellees, *vs.* Flint, Eddy & Company, respondents, appellants. Certificate. United States circuit court of appeals, second circuit. Filed Feb. 5, 1898. William Parkin, clerk.

Endorsed on cover: (Certificate.) Case No. 16,804. U. S. C. C. of appeals, 2nd circuit. Term No., 591. Flint, Eddy & Company, appellant, *vs.* George Christall and James Greig, as trustees. Filed February 21st, 1898.